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No. 05-259

IN THE

Supreme Court of the United States

Burlington Northern & Santa Fe Railway Co.,

Petitioner,

v.

Sheila White,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

Of Counsel:
PAUL SALVATORE
EDWARD CERASIA II
HEATHER G. MAGIER

PROSKAUER ROSE LLP
New York, NY
Newark, NJ
New Orleans, LA

ALLAN H. WEITZMAN
(Counsel of Record)
PROSKAUER ROSE LLP
2255 Glades Road
Suite 340 West
Boca Raton, FL 33431
(561) 241-7400

Counsel for Amici Curiae

TABLE OF CONTENTS

I. STATEMENT OF INTEREST OF AMICI CURIAE ... 1

II. SUMMARY OF ARGUMENT ... 4

III. ARGUMENT ... 6

A. Only "Ultimate Tangible Employment Actions" Should Be Actionable ... 6

B. Characterizing An Interim Or Minor Employment Action As An Actionable "Tangible Employment Action" Is So Expansive That Employers' Hands Will Be Tied In Day-To-Day Employment Decisions ... 16

IV. CONCLUSION ... 21

APPENDIX ... A-1

TABLE OF AUTHORITIES

Cases

Alfano v. Costello,
294 F.3d 365 (2d Cir. 2002).....20

Arbaugh v. Y. & H. Corp.,
125 S. Ct. 2246 (2005).....4

Ballard v. Comm'r,
125 S. Ct. 1270 (2005).....4

Billet v. CIGNA Corp.,
940 F.2d 812 (3d Cir. 1991).....20

Burlington Indus. v. Ellerth,
524 U.S. 742 (1998)..... *passim*

Collins v. Illinois,
830 F.2d 692 (7th Cir. 1987).....10

Couture v. Belle Bonfils Memorial Blood Center,
No. 04-1397, 151 Fed. Appx. 685
(10th Cir. Oct. 25, 2005).....13

Dale v. Chicago Tribune Co.,
797 F.2d 458(7th Cir. 1986), *cert. denied*,
479 U.S. 1066 (1987).....20

Davis v. Town of Lake Park,
245 F.3d 1232 (11th Cir. 2001).....20

Dorsey v. Pinnacle Automation Co.,
278 F.3d 830 (8th Cir. 2002).....20

Faragher v. City of Boca Raton,
524 U.S. 775 (1998)..... *passim*

Kocsis v. Multi-Care Mgmt.,
97 F.3d 876 (6th Cir. 1996).....12

Kolstad v. ADA,
527 U.S. 526 (1999).....4, 5, 10, 15

Marshall v. Barlow's, Inc.,
436 U.S. 307 (1978).....4

McNab v. United States,
540 U.S. 1177 (2004) 4
Mesnick v. Gen. Elec. Co.,
950 F.2d 816 (1st Cir. 1991) 20
Pa. State Police v. Suders,
542 U.S. 129 (2004) ..... *passim*
Pierce v. Underwood,
487 U.S. 552 (1988) 4
Rapanos v. United States,
126 S. Ct. 414 (2005) 4
Ray v. Henderson,
217 F.3d 1234 (9th Cir. 2000) 11
Richardson v. New York State Dep't of Correctional Serv., 180 F.3d 426
(2d Cir. 1999) 10
Shannon v. BellSouth Telecomms., Inc.,
292 F.3d 712 (11th Cir. 2002) 10
Walters v. Metropolitan Educ. Enters.,
519 U.S. 202 (1997) 4
White v. Burlington Northern & Santa Fe Ry.,
364 F.3d 789 (6th Cir. 2004) (en banc),
cert. granted in part, 126 S. Ct. 797 (2005) 11, 12
Williams v. Bristol-Myers Squibb Co.,
85 F.3d 270 (7th Cir. 1996) 13

Other Authorities

Martha Neil, *A Trap for Employers: Retaliation Actions Are on the Rise in Employment Discrimination Cases*, ABA Journal, August, 2005
(91—AUG A.B.A. J. 20) 17
U.S. Equal Employment Opportunity Commission
Charge Statistics FY 1992 Through FY 2004 16

I. STATEMENT OF INTEREST OF AMICI CURIAE[1]

This brief *amici curiae* is filed on behalf of two leading business organizations. The Society for Human Resource Management ("SHRM") is the world's largest association devoted to human resource management. Representing more than 200,000 individual members, SHRM's mission is to serve the needs of human resource professionals by providing the most essential and comprehensive resources available. SHRM provides education and information services, conferences and seminars, government and media representation, online services, and publications to its members. As an influential voice, SHRM's mission also is to advance the human resource profession to ensure that human resources is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 550 affiliated chapters and members in more than 100 countries.

The National Federation of Independent Business Legal Foundation — a nonprofit public interest law firm established to protect the rights of America's small business owners — is the legal arm of the National Federation of Independent Business ("NFIB"), the nation's oldest and largest organization dedicated to representing the interests of small business owners throughout all fifty states. The 600,000 NFIB members own a wide variety of small

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No persons or entities other than the *amici curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent are on file with the Clerk of Court.

businesses, including restaurants, family farms, neighborhood retailers, service companies, and technology manufacturers.

The *amici* organizations are vitally concerned with the orderly development of the law defining, in practical terms, the meaning of non-discrimination and equal employment opportunity, and more specifically, the nature and scope of an employer's obligation to provide a workplace free from retaliation. SHRM and NFIB recognize their responsibility to support and encourage compliance with fundamental principles of equal employment opportunity in the workplace and to discourage discrimination in any form. As part of this responsibility, the *amici* emphatically oppose and urgently counsel their members against any form of discrimination, including unlawful retaliation against individuals who have exercised their rights under Title VII or the numerous other employment laws that prohibit retaliation.

In compliance with these basic principles, SHRM and NFIB offer their members written guidance and training to develop policies and procedures that will encourage employers to prevent and employees to report retaliation in the workplace. For example, in its sample employee handbook accessible to members on its website, SHRM includes a section entitled "Non-Discrimination and Anti-Harassment Policy," which sets forth procedures for reporting, investigating, and responding to alleged incidents of harassment, discrimination, or retaliation.[2] This section includes the following provision:

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[2] An excerpt from the referenced handbook is attached in the Appendix.

Retaliation is Prohibited

> XYZ prohibits retaliation against any individual who reports discrimination or harassment or participates in an investigation of such reports. Retaliation against an individual for reporting harassment or discrimination or for participating in an investigation of a claim of harassment or discrimination is a serious violation of this policy and, like harassment or discrimination itself, will be subject to disciplinary action.[3]

NFIB provides similar guidance to its members in its Model Employee Handbook for Small Business, which includes a "Non-Harassment Policy/Non-Discrimination Policy," that sets forth similar procedures and prohibitions regarding retaliation.

With respect to this case, *amici*'s interest is to protect their members by supporting clear rules that encourage employers to initiate and maintain, and employees to use, procedures that address claims of unlawful retaliation. The standard advocated by Respondent and applied by the Sixth Circuit below is vague and uncertain, and unjustifiably increases the risk of litigation and employer liability for any interim or minor employment action. The standard adopted by the Sixth Circuit encourages employees to bypass internally established mechanisms and seek judicial redress prematurely, before the employer has had the opportunity to investigate and evaluate the propriety of a supervisor's allegedly retaliatory action. *Amici* submit this brief to further their goal of promoting management policies that foster the efficient internal resolution of employment

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[3] Appendix, at A-6.

disputes and limit the risk of liability for interim and intangible employment actions.

SHRM has participated as *amicus curiae* in many cases before this Court, including the cases establishing the principles that *amici* seek to uphold in this brief. *See, e.g.*, *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Pa. State Police v. Suders*, 542 U.S. 129 (2004); *Kolstad v. ADA*, 527 U.S. 526 (1999).[4]

II. SUMMARY OF ARGUMENT

Amici ask this Court to clarify that only final and formal employment actions may constitute discriminatory retaliation. Below, the Sixth Circuit determined that a job reassignment and a temporary suspension — neither resulting in any tangible loss to the plaintiff — constitute actionable forms of retaliation. *Amici* submit that this decision conflicts with Title VII policies consistently espoused by this Court when delineating the scope of actionable forms of discrimination. To effectuate these policies, which promote internal resolution of employee complaints, actionable retaliation should be limited to "tangible employment actions," which, to be "tangible," need to encompass final, official acts of the employer — in other words, "ultimate tangible employment actions," such as hiring, firing, or failing to promote.

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[4] SHRM and NFIB have participated separately or collectively in other cases before this Court; *see Arbaugh v. Y. & H. Corp.*, 125 S. Ct. 2246 (2005) (SHRM and NFIB); *Ballard v. Comm'r*, 125 S. Ct. 1270 (2005) (NFIB); *Rapanos v. United States*, 126 S. Ct. 414 (2005) (NFIB); *McNab v. United States*, 540 U.S. 1177 (2004) (NFIB); *Walters v. Metropolitan Educ. Enters.*, 519 U.S. 202 (1997) (SHRM); *Pierce v. Underwood*, 487 U.S. 552 (1988) (SHRM); *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (SHRM).

In its prior decisions, this Court created "safe harbors" from discrimination complaints for employers who promote legal compliance, *i.e.*, establish and utilize internal policies and procedures designed to prevent their supervisors from violating protected rights and to correct those situations where non-compliant supervisors do not follow company policy. Thus, when the treatment of an employee falls short of being a "tangible employment action," the employer may assert an affirmative defense if it has in place the appropriate internal resolution mechanisms and the employee has not taken advantage of these channels for avoiding litigation. *See Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (establishing affirmative defense to sexual harassment hostile environment claims); *Pa. State Police v. Suders*, 542 U.S. 129 (2004) (extending affirmative defense to certain constructive discharge claims); *see also Kolstad v. ADA*, 527 U.S. 526 (1999) (denying punitive damages when employers make good-faith efforts to prevent discrimination in the workplace).

Amici submit that the Court's prior decisions, when read in their entirety, require the standard for actionable retaliation to incorporate the policies underlying these previously established "safe harbors" for all manifestations of discrimination. In so doing, there is a compelling need for this Court to provide the identical standard for actionable conduct to answer these closely related questions: What is discrimination? What is harassment? And, in the issue at hand, what is retaliation?

Thus, when an employer achieves legal compliance and cures an interim employment act by a supervisor that was done in contravention of the employer's anti-retaliation policy, there should be no liability. Otherwise, there is an

inherent conflict in instructing employers to establish — and employees to utilize — internal grievance procedures, while at the same time removing all incentive for these mechanisms by attaching liability for actions that employers have not had the chance to review pursuant to those procedures.

To cure this tension, *amici* urge this Court to assimilate the principles endorsed in previous decisions and hold expressly that only "ultimate tangible employment actions," imposed after the exhaustion of internal grievance procedures, are "official" acts sufficient to form the basis of a claim of actionable unlawful discrimination in any form, including retaliation. This unified standard comports with the policies expressed in prior decisions of this Court, and will provide clear guidance to employers, practitioners and the lower courts.

III. ARGUMENT

A. Only "Ultimate Tangible Employment Actions" Should Be Actionable.

This Court has recognized that employer liability for discrimination under Title VII attaches "when a discriminatory act results in a tangible employment action." *Ellerth*, 524 U.S. at 760; *see also Faragher*, 524 U.S. at 790 ("[T]here is nothing remarkable in the fact that claims against employers for discriminatory employment actions with tangible results, like hiring, firing, promotion, compensation, and work assignment, have resulted in employer liability once the discrimination was shown."). Because of the need to have one clear standard, *amici* submit that what is actionable retaliation should be governed by the same test. Indeed, especially in the retaliation context, there

is a need to clarify that tangible employment actions do not include job transfers to equal paying positions or interim suspensions that are subsequently overturned through internal complaint procedures.

To reach this result, this Court need only explain that its prior decisions, read in their entirety and incorporating their policy pronouncements, must limit actionable retaliatory actions to "ultimate tangible employment actions," defined to include only those that are final "official" acts of the employer, implemented after exhaustion of internal resolution mechanisms. This standard will give a unified direction to employers, small businesses, and practitioners, while reinforcing the incentive to employees to fulfill their duty to mitigate and to employers to fulfill their duty to conciliate.

In *Ellerth* and *Faragher*, this Court recognized that the purposes of Title VII are served by imposing duties on the employer and the employee to make good faith efforts to resolve discrimination complaints internally. The Court determined that an employer may be strictly liable for sexual harassment by a supervisor only if there has been a "tangible employment action." In its decision, the Court "imported" from lower court decisions a non-exhaustive list of acts within and without this category:

> A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.

Ellerth, 524 U.S. at 761. The Court excluded from this

category "a bruised ego," "demotion without change in pay, benefits, duties or prestige," and "reassignment to more inconvenient job." *Id.* The Court explained further that a tangible employment action must be an "official" company act:

> Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors. . . . The supervisor often must obtain the imprimatur of the enterprise and use its internal processes.

524 U.S. at 762. When there has been no tangible employment action, the employer may assert an affirmative defense if "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and the employee "unreasonably failed to take advantage of any preventive or corrective opportunities." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

This standard for employer liability was intended to accommodate Title VII's "basic policies of encouraging forethought by employers and saving action by objecting employees . . . ." *Ellerth*, 524 U.S. at 764. Echoing these principles, the Court stated in *Faragher* that this framework was intended to "avoid [the] particular temptation to litigate," by allowing the employer to show it had sought to prevent or eliminate harassment, while the employee had failed "to prevent harm that could have been avoided":

> Although Title VII seeks "to make persons whole for injuries suffered on account of unlawful employment discrimination," [citation omitted], its "primary objective," like that of any statute meant to influence primary conduct, is *not to provide redress but to avoid harm. . . .* It would . . . implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty. *Indeed, a theory of vicarious liability for misuse of supervisory power would be at odds with the statutory policy if it failed to provide employers with some such incentive.*
>
> The requirement to show that the employee has failed in a coordinate duty to avoid or mitigate harm reflects *an equally obvious policy imported from the general theory of damages, that a victim has a duty "to use such means as are reasonable under the circumstances to avoid or minimize the damages"* that result from violations of the statute.

524 U.S. at 805-806 (emphasis added) (citations omitted).

This Court's subsequent decisions have assimilated these remedial and preventive purposes by imposing other limits on liability for discrimination, requiring an "official" company act before an employer may be liable, and providing a defense to employers who promulgate anti-discrimination policies and attempt internal resolution. *See Suders*, 542 U.S. at 134 and 150 (constructive discharge

claims must "follow the path marked by" *Ellerth* and *Faragher*, which "divided the universe of supervisor-harassment claims according to the presence or absence of an official act . . ."; affirmative defense available if there is no official act, employer had effective policy for resolving harassment complaints, and plaintiff failed to avail herself of remedial apparatus); *Kolstad*, 527 U.S. at 545 (" '[g]iving punitive damages protection to employers who make good-faith efforts to prevent discrimination in the workplace accomplishes' Title VII's objective of 'motivat[ing] employers to detect and deter Title VII violations' ").

Amici submit that to determine what constitutes actionable retaliation, the lower courts should be instructed to incorporate these same policies and interrelated duties. Those lower courts that have imposed liability for retaliation based on actions that fall short of final, tangible employment actions, have interpreted the law too broadly.[5] By holding that Title VII's retaliation provision covers any adverse treatment or subjectively disadvantageous effect, some courts have attached liability to interim or minor actions not intended to be actionable by either Title VII or this Court.

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[5] *See, e.g., Richardson v. New York State Dep't of Correctional Serv.*, 180 F.3d 426 (2d Cir. 1999) (transfer resulting in different duties and contact with prisoners was adverse employment action); *Collins v. Illinois*, 830 F.2d 692 (7th Cir. 1987) (transfer to different department with no reduction in pay or benefits was adverse action because plaintiff no longer had own office, phone, or business cards); *Shannon v. BellSouth Telecomms., Inc.*, 292 F.3d 712 (11th Cir. 2002) (plaintiff suffered adverse employment action because he was "totally blackballed" from overtime opportunities, despite evidence that fewer overtime opportunities were available because of the hiring of additional employees).

For example, the Ninth Circuit, in *Ray v. Henderson*, 217 F.3d 1234, 1242-43 (9th Cir. 2000), relying on EEOC Compliance Manual Section 8, "Retaliation," ¶ 8008 (1998), determined that "an action is cognizable as an adverse employment action if it is reasonably likely to deter employees from engaging in protected activity." On the one hand, that standard is inherently incompatible with the "ultimate tangible employment action" standard *if* it fails to encourage internal complaints and allow for a potential cure of "deterrent" events. On the other, *amici* submit that the standard they propose, by requiring any suspect actions to be internally reviewable and reversible, incorporates the concerns underlying the Ninth Circuit's and the EEOC's standard. If the applicable standard requires potentially chilling conduct to be subject to complaint and upon review to become an "official act" before it can be deemed actionable, the deterrent potential is ultimately eliminated.

In the present case, the lower court considered two interim employment actions that the employee claimed were imposed in retaliation for her complaints of discrimination. She was reassigned from her job operating a forklift to a position she previously held and originally applied for, retaining the same pay and benefits. Later, she was suspended without pay, until her grievance was resolved, at which time she was reinstated with full back pay. In analyzing whether these were actionable as unlawful retaliation, the Sixth Circuit cited *Ellerth* for the principle that "not just any discriminatory act by an employer constitutes discrimination under Title VII,"[6] and relied on *Ellerth*'s illustrative list of tangible employment actions.[7]

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[6] *White v. Burlington Northern & Santa Fe Ry.*, 364 F.3d 789, 795 (6th Cir. 2004) (en banc), *cert. granted in part*, 126 S. Ct. 797 (2005).

[7] *Id.* at 798.

The Sixth Circuit also urged, as do *amici* here, that one standard should "[apply] equally to all Title VII discrimination claims, not only to retaliation claims. Having a different standard for different provisions of Title VII would be burdensome and unjustified by the text of the statute . . . ."[8]

Despite giving recognition to these fundamental principles, the Sixth Circuit failed to reconcile its decision with *Ellerth*'s examples of actionable conduct and its "linkage of liability limitation to effective preventive and corrective measures . . . ." *Suders*, 542 U.S. at 145. Thus, rather than adopt a standard for retaliation that supported Title VII's conciliatory purposes by giving an incentive to both employers and employees to attempt resolution through internal grievance procedures, the Sixth Circuit held the employee must only "show that she suffered 'a materially adverse change in the terms of her employment.' "[9] Indeed, the Sixth Circuit found that the pendency of an internal grievance process should not preclude an employee from bringing an action under Title VII to challenge the decision under review.[10] However, by rejecting the importance of seeing the grievance process to its conclusion, the Sixth Circuit ignored this Court's teachings and established a doctrine that, if affirmed, will encourage early, unnecessary, and docket-clogging litigation.

The Sixth Circuit rejected a more stringent standard for the additional stated reason that merely reversing and reimbursing for an erroneous decision contravenes a

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[8] *Id.* at 799.

[9] *Id.* at 797, citing *Kocsis v. Multi-Care Mgmt.*, 97 F.3d 876 (6th Cir. 1996).

[10] 364 F.3d at 803.

statutory scheme that makes persons whole for injuries suffered by providing interest on back pay, attorney's fees, punitive damages, and damages for emotional suffering. In so doing, the lower court did not appreciate that garden variety payroll adjustments to correct any number of mistakes happen on a regular basis; and in these circumstances, employers never pay attorney's fees, punitive or compensatory damages, or interest. The applicable standard for actionable retaliation should not deprive employers of the opportunity to correct mistaken decisions by supervisors. A potentially unlawful interim employment action can be and should be cured after review through internal processes. Here, the interim suspension without pay was not the end result of the employer's internal processes. Rather, the ultimate act of the employer was the lifting of the suspension and restoration of full pay. Similarly, reassigning the employee to other tasks within her job classification was not a tangible employment action sufficient to create employer liability, even if the job were more inconvenient. *See Ellerth*, 524 U.S. at 761.

In these circumstances, the Sixth Circuit made no attempt to explain how a reassignment to a previously held position and a reversed suspension with no economic harm fell within the same category as "hiring, firing, failing to promote, reassignment with significantly different responsibilities . . . ." *Id.*[11] Nor did it reconcile its decision

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[11] Citing *Ellerth*, and noting that "not everything that makes an employee unhappy is an actionable adverse action," the Tenth Circuit recently held that an employee's dissatisfaction with his new position was insufficient to establish a violation of the Americans with Disabilities Act. *Couture v. Belle Bonfils Memorial Blood Center*, No. 04-1397, 151 Fed. Appx. 685 (10th Cir. Oct. 25, 2005) (unpublished) ("reassignment to [a job] which is simply undesired by the plaintiff is not" an actionable employment action). *See also Williams v. Bristol-*

with *Suders*, in which this Court "follow[ed] the path marked by" *Ellerth* and *Faragher* by giving these examples of tangible employment actions: "employer-sanctioned adverse action[s] officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions." *Suders*, 542 U.S. at 134.

Indeed, the decision below runs afoul of this Court's carefully crafted policy pronouncements that underlie the affirmative defense established in *Faragher* and *Ellerth*. By creating an affirmative defense for employers who establish and maintain appropriate internal grievance mechanisms, this Court gave employers significant incentive to respond to complaints internally. The decision below, however, discourages exhaustion of internal grievance procedures and provides a disincentive to employers to attempt to discharge their duty under Title VII to prevent unlawful retaliatory behavior. Indeed, unless reversed, the Sixth Circuit will enhance the "temptation to litigate"[12] by plaintiffs' lawyers who merely seek attorney's fees or other damages in situations where the employer's reversal of supervisory conduct will be used to support an implied claim of wrongdoing. Given that economic risk, how can *amici* responsibly advise their members to have policies that are designed to correct retaliation?

Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996) (purely lateral transfer, with no demotion in form or substance, and no reduction in pay, is not actionable discrimination; "[o]therwise every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit. The [EEOC], already staggering under an avalanche of filings too heavy for it to cope with, would be crushed, and serious complains would be lost among the trivial.").

[12] *Faragher*, 524 U.S. at 806.

In its non-exclusive list of what constitutes a "tangible employment action," this Court signaled that this standard should not encompass a reassignment to a position that does not have intolerable working conditions, a reversed suspension with no resulting economic harm, or a myriad of other minor or interim employment actions. The Court needs to reinforce this signal here because its illustrative list has been misapplied at best, or ignored at worst.

This Court should now complete the evolution of a uniform standard for employer liability and state explicitly what constitutes an actionable tangible employment action for all manifestations of discrimination in the workplace. To assist the lower courts, human resource professionals and small company executives, this Court should enunciate a unitary, more explicit, appropriate, and practical standard that can be applied consistently and with certainty, and that removes from judicial scrutiny any conduct that falls short of an ultimate tangible employment action.

Ellerth and *Faragher* teach that to be an actionable ultimate tangible employment action, the event complained of must satisfy the enumerated *Ellerth* factors for tangible employment actions, *i.e.*, result in significant change in employment status and also be an official, final act that has been given the imprimatur of the employer, implemented after review via its internal processes. This fundamental *Ellerth* principle rests on the "basic policy" of Title VII: to "encourage[e] forethought by employers and saving action by objecting employees . . . ." 524 U.S. at 764. To fully effectuate this policy, it would be improper to impose employer liability for interim, allegedly retaliatory employment decisions that are not *ultimate*. *See Kolstad*, 527 U.S. at 545 ("Dissuading employers from implementing programs or policies to prevent discrimination in the workplace is directly contrary to the purposes underlying

Title VII. The statute's 'primary objective' is 'a prophylactic one.' "). Internal mechanisms for resolution of retaliation complaints should be afforded the same deference as mechanisms in place to deal with harassment complaints.

To be consistent with the policies espoused in *Ellerth* and *Faragher*, the Court should take the next step and make explicit what was intended. *Amici* respectfully submit that an allegedly retaliatory act cannot constitute illegal discrimination until it is a final, official, irreversible action, implemented after exhaustion of the employer's internal resolution mechanisms.

B. Characterizing An Interim Or Minor Employment Action As An Actionable "Tangible Employment Action" Is So Expansive That Employers' Hands Will Be Tied In Day-To-Day Employment Decisions.

The Sixth Circuit's decision jeopardizes legitimate employer practices by imposing an unwarranted and unpredictable litigation risk. EEOC statistics show that the number of Title VII retaliation complaints almost doubled in the period between 1992 and 2004 — from 10,499 charges filed in fiscal year 1992, to 20,240 charges filed in fiscal year 2004.[13] These statistics demonstrate that the litigation risk is real and there is an urgent need for clarity in a workplace environment infested by increasing retaliation claims.

Recent analysis confirms that this trend stems in part from precisely the problem *amici* ask this Court to resolve:

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[13] *Charge Statistics FY 1992 Through FY 2004*, compiled by the Office of Research, Information, and Planning from the U.S. Equal Employment Opportunity Commission's Charge Data System, http://www.eeoc.gov/stats/charges.html (last modified Jan. 27, 2005).

the lower courts' recognition of an expanding and volatile range of retaliation claims. Martha Neil, *A Trap for Employers: Retaliation Actions Are on the Rise in Employment Discrimination Cases*, ABA Journal, August, 2005 (91—AUG A.B.A. J. 20). Indeed, given this trend, it has become more difficult for employers to predict "potential pitfalls," especially given that "[w]hat exactly constitutes retaliation varies, depending on . . . the appellate circuit in which [the law] will be applied."[14]

Contributing to this unpredictability is the nature of a retaliation claim. Discrimination complaints stem from conduct that is recognized as inherently egregious and avoidable. In contrast, retaliation claims often concern conduct arising from an emotional response that simply reflects human nature: a supervisor wrongfully accused of discrimination may, without intending impermissible retaliation, "get caught [up] in the heat of the moment."[15] The employer's internal mechanisms, implemented through a human resource professional or upper level management, who act as goalkeepers, fulfill the employer's responsibility to ensure that human nature is not permitted to eviscerate statutory rights. Missteps of human nature should be permitted to be investigated and potentially cured by internal review.

Without clear guidance from this Court, employers risk being held liable for individual conduct that Title VII was not meant to address — because it lacks the official "imprimatur of the enterprise." *Ellerth*, 524 U.S. at 762. Only final, official acts of the employer should be actionable as discriminatory retaliation. Otherwise, affirming the Sixth

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[14] *Id.* at 20-21.

[15] *Id.* at 20.

Circuit's decision not only conflicts with this Court's efforts to promote Title VII's statutory policy of conciliation, but also is detrimental to the accepted and successful structure of the American workplace.

It is part of normal operations for an employer to control the rules and regulations of its business, imposing interim disciplinary measures when appropriate. For the courts to say, in conflict with this structure, that any interim employment decision is subject to legal scrutiny, interferes with the corporation's or small business's autonomy. Congress did not intend Title VII to impinge an employer's ability to move employees from one job to another, where the pay is the same, for fear that the transferred employee will be unhappy and file a lawsuit alleging that the transfer was retaliatory.

A low threshold for liability also will discourage employers from imposing interim disciplinary measures in lieu of termination. For example, if reviewable suspension and termination are equally actionable under the law, an employer may simply terminate an employee, rather than invest time and effort in suspension or other interim measures, followed by investigation and seeing internal mechanisms through to their conclusion. Moreover, suspension with pay is not a satisfactory alternative interim measure, because it rewards individuals who may later be determined to have acted improperly.

Beyond this, without overruling the Sixth Circuit, there is no incentive for an employer to review an interim or temporary employment decision, with an eye to reversing it if it is incorrect, if by so doing the employer would merely confirm that the interim conduct was retaliatory. Attaching actionable retaliation status before the completion of internal

review will encourage employers not to reverse interim decisions out of fear that they will be deemed to have admitted wrongdoing, and therefore subject to liability for attorney's fees and damages. The better alternative is to have potential liability accrue only after the employer has had the opportunity to cure the improper conduct.

In enacting Title VII, Congress favored a policy of "conciliation rather than litigation."[16] Making any minor or interim employment decision actionable encourages litigation, and thus conflicts with that policy and the one advocated by this Court, favoring conciliation through the creation of internal mechanisms for resolving employee grievances. Reading *Ellerth* and *Faragher* as a whole, an interim employment action cannot be within the intended sphere of *actionable* tangible employment actions, including retaliation.

Moreover, adopting the Sixth Circuit's low threshold for actionable retaliation interferes directly with the employer's incentive to adopt the conciliatory, internal measures recommended, encouraged, and blessed by the courts and the EEOC as the appropriate way to implement the purposes of Title VII. If employees can short-circuit the internal review process by bypassing the employer's internal grievance procedures and filing a lawsuit immediately upon the imposition of any interim disciplinary measure, employers are discouraged from proceeding through the review process and constructively deprived of the opportunity to review and possibly reverse interim or unofficial acts. Consequently, any standard that does not incorporate the "affirmative defense" for retaliation complaints encourages employees to bring suit immediately upon imposition of any employment

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[16] *Ellerth*, 524 U.S. at 764.

action that has any negative connotation, no matter how minor or temporary, without appealing the employer's decision and awaiting the results of the internal resolution process and a potential "cure" of the initial action.

Finally, the consequence of a standard that does not include an internal appeal process is an increased litigation risk and an inappropriately expanded role of the courts in supervising employment decisions. As a practical matter, the Sixth Circuit's standard will turn federal judges into corporate managers or human resource departments, required to preside over insignificant or petty complaints by employees, bruised egos, and inconveniences, and to second guess the employer's responses or business decisions. *See Alfano v. Costello*, 294 F.3d 365, 377 (2d Cir. 2002) (court's role is not to act as a super-personnel department that second guesses employers' business judgments); *Dorsey v. Pinnacle Automation Co.*, 278 F.3d 830 (8th Cir. 2002) (same).[17] This is an inappropriate and unintended role for the federal judiciary system and supports a reversal of the Sixth Circuit's decision.

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[17] *Accord Davis v. Town of Lake Park*, 245 F.3d 1232, 1244 (11th Cir. 2001); *Mesnick v. Gen. Elec. Co.*, 950 F.2d 816, 825 (1st Cir. 1991); *Billet v. CIGNA Corp.*, 940 F.2d 812, 828 (3d Cir. 1991); *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987).

IV. CONCLUSION

For all the foregoing reasons, SHRM and the NFIB Legal Foundation respectfully request that this Court reverse the Sixth Circuit's decision and hold that neither job transfers to equal paying positions nor interim suspensions that are subsequently overturned through internal complaint procedures constitute actionable retaliation under Title VII, because only a final, ultimate tangible employment action may be the basis for a claim of unlawful retaliation under Title VII.

Respectfully submitted,

Of Counsel:
PAUL SALVATORE
EDWARD CERASIA II
HEATHER G. MAGIER

PROSKAUER ROSE LLP
New York, NY
Newark, NJ
New Orleans, LA

ALLAN H. WEITZMAN
(Counsel of Record)
PROSKAUER ROSE LLP
2255 Glades Road
Suite 340 West
Boca Raton, FL 33431
(561) 241-7400

Counsel for Amici Curiae

APPENDIX

Excerpt

SHRM Sample Selected Policies From: Employee Handbook

EQUAL EMPLOYMENT OPPORTUNITY POLICY STATEMENT

Equal Employment Opportunity has been, and will continue to be, a fundamental principle at XYZ, where employment is based upon personal capabilities and qualifications without discrimination because of race, color, religion, sex, age, national origin, disability, or any other protected characteristic as established by law.

This policy of Equal Employment Opportunity applies to all policies and procedures relating to recruitment and hiring, compensation, benefits, termination and all other terms and conditions of employment. The Human Resources Department has overall responsibility for this policy and maintains reporting and monitoring procedures. Employees' questions or concerns should be referred to the Human Resources Department. Appropriate disciplinary action may be taken against any employee willfully violating this policy.

NON-DISCRIMINATION AND ANTI-HARASSMENT POLICY

[NOTE TO EMPLOYER: This sample policy is intended to be used as part of the "affirmative defense" to liability adopted in the 1998 United States Supreme Court decisions, *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998) and

Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257 (1998). The policy also incorporates most of the suggestions set forth in the June 21, 1999 Equal Employment Opportunity Commission's Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors. The Supreme Court decisions (and the EEOC Guidance) place the burden on employers to take action to prevent and remedy harassment in the workplace in order to avoid liability. Accordingly, we recommend that, at a minimum, the Employer should: include the policy in a prominent place in its employee handbook (if it has one); ensure that employees have effective avenues to bring complaints forward (not just through their supervisor); widely disseminate the policy (independent of the employee handbook) throughout the workplace on a periodic basis to make sure all employees know of its existence and understand the complaint procedure; respond to complaints brought under the policy by promptly and thoroughly investigating them in good faith to determine if violations of the policy have occurred; take prompt, appropriate remedial action to enforce the policy; and ensure that the designated "complaint-recipients" are well-prepared to handle the complaints they may receive and that whoever is assigned to investigate these complaints has sufficient training and experience to do so properly.]

The XYZ Company is committed to a work environment in which all individuals are treated with respect and dignity. Each individual has the right to work in a professional atmosphere that promotes equal employment opportunities and prohibits discriminatory practices, including harassment. Therefore, XYZ expects that all relationships among persons in the workplace will be businesslike and free of bias, prejudice and harassment.

Equal Employment Opportunity

[NOTE TO EMPLOYER: Depending on the states or cities within which your company does business, you may opt not to include some or all of the protected categories (citizenship, marital status, creed, genetic predisposition or carrier status, sexual orientation) listed in brackets below and under "Definitions of Harassment," paragraph "b." as prohibited bases of discrimination or harassment. While New York State law prohibits discrimination or harassment on the basis of a person's marital status, creed, or genetic predisposition or carrier status, and New York City law prohibits discrimination or harassment based on a person's marital status, creed, sexual orientation, or alienage or citizenship status, other state or local laws may not. Other states or localities may prohibit discrimination on the basis of other protected classes which would need to be included in the policy. Therefore, before finalizing this language, you should seek advice from counsel to ensure compliance with state and local laws.]

It is the policy of XYZ to ensure equal employment opportunity without discrimination or harassment on the basis of race, color, national origin, religion, sex (with or without sexual conduct), age, disability, [alienage or citizenship status, marital status, creed, genetic predisposition or carrier status, sexual orientation] or any other characteristic protected by law. XYZ prohibits and will not tolerate any such discrimination or harassment.

Definitions of Harassment

a. Sexual harassment constitutes discrimination and is illegal under federal, state and local laws. For the purposes

of this policy, sexual harassment is defined, as in the Equal Employment Opportunity Commission Guidelines, as unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when, for example: (i) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; (ii) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or (iii) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

Sexual harassment may include a range of subtle and not so subtle behaviors and may involve individuals of the same or different gender. Depending on the circumstances, these behaviors may include, but are not limited to: unwanted sexual advances or requests for sexual favors; sexual jokes and innuendo; verbal abuse of a sexual nature; commentary about an individual's body, sexual prowess or sexual deficiencies; leering, catcalls or touching; insulting or obscene comments or gestures; display or circulation in the workplace of sexually suggestive objects or pictures (including through e-mail); and other physical, verbal or visual conduct of a sexual nature. Sex-based harassment that is, harassment not involving sexual activity or language (e.g., male manager yells only at female employees and not males) may also constitute discrimination if it is severe or pervasive and directed at employees because of their sex.

b. Harassment on the basis of any other protected characteristic is also strictly prohibited. Under this policy, harassment is verbal or physical conduct that denigrates or shows hostility or aversion toward an individual because of

his/her race, color, religion, national origin, age, disability, [alienage or citizenship status, marital status, creed, genetic predisposition or carrier status, sexual orientation] or any other characteristic protected by law or that of his/her relatives, friends or associates, and that: (i) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (ii) has the purpose or effect of unreasonably interfering with an individual's work performance; or (iii) otherwise adversely affects an individual's employment opportunities. Harassing conduct includes, but is not limited to: epithets, slurs or negative stereotyping; threatening, intimidating or hostile acts; denigrating jokes and display or circulation in the workplace of written or graphic material that denigrates or shows hostility or aversion toward an individual or group (including through e-mail).

Individuals and Conduct Covered

These policies apply to all applicants and employees, and prohibit harassment, discrimination and retaliation whether engaged in by fellow employees, by a supervisor or manager or by someone not directly connected to XYZ (e.g., an outside vendor, consultant or customer).

Conduct prohibited by these policies is unacceptable in the workplace and in any work-related setting outside the workplace, such as during business trips, business meetings and business-related social events.

Retaliation Is Prohibited

XYZ prohibits retaliation against any individual who reports discrimination or harassment or participates in an investigation of such reports. Retaliation against an individual for reporting harassment or discrimination or for participating in an investigation of a claim of harassment or discrimination is a serious violation of this policy and, like harassment or discrimination itself, will be subject to disciplinary action.

COMPLAINT PROCEDURE

[NOTE TO EMPLOYER: Before issuing this policy, the Employer should decide who will be responsible for receiving employee complaints of harassment, discrimination or retaliation. The Employer should be sure to designate (and identify below) several different "avenues of complaint" for its employees so that if an employee feels uncomfortable discussing the matter with one of the representatives designated to receive complaints, he or she may bypass that "avenue" and choose another. The Employer should keep in mind when choosing those responsible for receiving complaints that the key to an effective complaint procedure is that it is easily accessible and that employees feel comfortable using it. Listed below in brackets are examples of "avenues of complaint" the Employer may wish to designate. It is advisable to designate at least one individual outside an employee's chain of command (such as a member of the Human Resources Department, if the Employer has one). Of course, because size and corporate structure vary from employer to employer, the individual employer can best determine those who will serve as effective "complaint recipients." It is therefore

necessary for the Employer to customize the policy and substitute the appropriate titles or names for the bracketed examples provided below.]

Reporting an Incident of Harassment, Discrimination or Retaliation

XYZ strongly urges the reporting of all incidents of discrimination, harassment or retaliation, regardless of the offender's identity or position. Individuals who believe they have experienced conduct that they believe is contrary to XYZ's policy or who have concerns about such matters should file their complaints with [their immediate supervisor, the Director of Human Resources or any member of the Human Resources Department, or any Ombudsman] before the conduct becomes severe or pervasive. Individuals should not feel obligated to file their complaints with their immediate supervisor first before bringing the matter to the attention of one of the other XYZ designated representatives identified above.

[NOTE TO EMPLOYER: Some employers may wish to emphasize in their policy that the Supreme Court decisions and the EEOC Guidance impose an obligation not only on employers, but on employees too. Employees have an obligation to take advantage of the complaint mechanisms offered by employers; and an employee's failure to do so unreasonably (e.g., does not complain, refuses to cooperate in the investigation), will in appropriate circumstances allow the employer to establish an affirmative defense to liability if the employee takes subsequent legal action. An employer can emphasize the employee's obligation in the policy by inserting a "Notice" which may be worded as follows in the

box below. This language may make it more likely that the employee's failure to take advantage of the employer's complaint procedure will be found "unreasonable," thus satisfying one of the elements of the affirmative defense. If you would like to include the "Notice" in your policy, it should be inserted below.]

IMPORTANT NOTICE TO ALL EMPLOYEES:

Employees who have experienced conduct they believe is contrary to this policy have an obligation to take advantage of this complaint procedure. An employee's failure to fulfill this obligation could affect his or her rights in pursuing legal action. Also, please note, federal, state and local discrimination laws establish specific time frames for initiating a legal proceeding pursuant to those laws.

Early reporting and intervention have proven to be the most effective method of resolving actual or perceived incidents of harassment. Therefore, while no fixed reporting period has been established, XYZ strongly urges the prompt reporting of complaints or concerns so that rapid and constructive action can be taken. XYZ will make every effort to stop alleged harassment before it becomes severe or pervasive, but can only do so with the cooperation of its staff/employees.

The availability of this complaint procedure does not preclude individuals who believe they are being subjected to harassing conduct from promptly advising the offender that his or her behavior is unwelcome and requesting that it be discontinued.

The Investigation

Any reported allegations of harassment, discrimination or retaliation will be investigated promptly, thoroughly and impartially. The investigation may include individual interviews with the parties involved and, where necessary, with individuals who may have observed the alleged conduct or may have other relevant knowledge.

Confidentiality will be maintained throughout the investigatory process to the extent consistent with adequate investigation and appropriate corrective action.

Responsive Action

Misconduct constituting harassment, discrimination or retaliation will be dealt with promptly and appropriately. Responsive action may include, for example, training, referral to counseling, monitoring of the offender and/or disciplinary action such as warning, reprimand, withholding of a promotion or pay increase, reduction of wages, demotion, reassignment, temporary suspension without pay or termination, as XYZ believes appropriate under the circumstances.

* * * *

[NOTE TO EMPLOYER: Some employers may wish to provide a complaining party who is dissatisfied with the resolution of his or her complaint with a mechanism for review by higher management. If this is the case, the

Employer should include the following sentence, with the appropriate reviewing officer(s) substituted for the examples in brackets provided below.]

If an employee making a complaint does not agree with its resolution, the employee may appeal to XYZ's [Executive Director or Chief Operating Officer].

Individuals who have questions or concerns about these policies should talk with [NOTE TO EMPLOYER: insert, for example: the Director of Human Resources or a member of the Human Resources Department.]

Finally, these policies should not, and may not, be used as a basis for excluding or separating individuals of a particular gender, or any other protected characteristic, from participating in business or work-related social activities or discussions in order to avoid allegations of harassment. The law and the policies of XYZ prohibit disparate treatment on the basis of sex or any other protected characteristic, with regard to terms, conditions, privileges and perquisites of employment. The prohibitions against harassment, discrimination and retaliation are intended to complement and further these policies, not to form the basis of an exception to them.